APPELLATE CIVIL

Before Mr. Justice Rajadhyaksha and Mr. Justice Chainani.

1952 July 8

TATYA MOHYAJI DHOMSE (ORIGINAL DEFENDANT), APPELLANT *v.* RABHA DADAJI DHOMSE (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—De facto guardian, alienation by—Whether void or voidable —Indian Limitation Act (IX of 1908), Art. 44—Whether suit to set aside alienation necessary—Marriage of minor, whether legal necessity.

An alienation of a minor's property by a *de facto* guardian, which is not justified by legal necessity, is void *ab initio* and confers no title upon the alienee. It is open to the minor, on attaining majority, to ignore such an alienation and to proceed to file a suit for the recovery of the property without, in the first instance, filing a suit for setting aside the alienation within the period prescribed under Art. 44 of the Indian Limitation Act, 1908.

Malakarjun Annarao v. *Sarubai Shivyogi*,[1] *Balappa* v. *Chanbasappa*,[2] *Hanmantappa* v. *Dundappa*,[3] *Chinna Alagumperumal Karayalar* v. *Vinayagathammal*,[4] *Bapayya* v. *Pundarikakshayya*,[5] *Labha Mal* v. *Malak Ram*,[6] and *Kailashchandra* v. *Rajani Kant*,[7] relied upon.

Hunoomanprasaud Panday v. *Mussammat Babooee Munraj Koonwaree*,[8] *Fakirappa Limanna Patil* v. *Lumanna Mahadu Dhamnekar*,[9] *Limbaji Ravji* v. *Rahi*,[10] *Bai Amrit* v. *Bai Manik*,[11] *Nathuram* v. *Shoma Chhagan*,[12] *Tulsidas* v. *Vaghela Raisingji*,[13] *Mata Din* v. *Ahmed Ali*,[14] *Imambandi* v. *Mutsaddi*,[15] *Adhar Chandra Dutt* v. *Kirtibash Bairagee*,[16] *Arunachela Reddi* v. *Chidambara Reddi*,[17] *Mohanund Mondul* v. *Nafur Mondul*,[18] *Thayammal* v. *Kuppanna Koundan*,[19] and *Ramaswami Pillai* v. *Kasinatha Iyer*,[20] referred to.

Seetharamanna v. *Appiah*,[21] *Tapassi Ram* v. *Raja Ram*,[22] and *Adeyya* v. *Govinda*,[23] dissented from.

An alienation of a minor's properties to meet the expenses of his marriage contracted in violation of the Child Marriage Restraint Act, 1929, is not one for legal necessity.

Ram Jash Agarwala v. *Chand Mandal*,[24] *Hunsraj Bhuteria* v. *Askaran Bhuteria*,[25] and *Tikki Lal* v. *Komalchand*,[26] relied upon.

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*Second Appeal No. 277 of 1949.

(1) (1942) 45 Bom. L. R. 259.
(2) (1915) 17 Bom. L. R. 1134.
(3) (1933) 36 Bom. L. R. 474.
(4) [1929] A. I. R. Mad. 110.
(5) [1946] A. I. R. Mad. 198.
(6) [1925] A. I. R. Lah. 619.
(7) [1945] A. I. R. Pat. 298.
(8) (1856) 6 Moo. I. A. 393.
(9) (1919) 44 Bom. 742.
(10) (1925) 49 Bom. 576.
(11) (1875) 12 Bom. H. C. R. 79.
(12) (1890) 14 Bom. 562.
(13) (1932) 57 Bom. 40, F. B.
(14) (1911) L. R. 39 I. A. 49.
(15) (1918) L. R. 45 I. A. 73.
(16) (1910) 12 Cal. L. J. 586.
(17) (1903) 13 Mad. L. J. 223.
(18) (1899) 26 Cal. 820.
(19) (1914) 38 Mad. 1125.
(20) [1928] A. I. R. Mad. 226.
(21) (1925) 49 Mad. 768.
(22) [1930] A. I. R. Lah. 136.
(23) [1931] A. I. R. Mad. 274.
(24) (1937) 2 Cal. 764.
(25) [1941] A. I. R. Cal. 244.
(26) [1940] A. I. R. Nag. 327.

SECOND APPEAL against the decision of L. Y. Ankalki, Extra Assistant Judge, Poona reversing the decision of S. G. D'Costa Civil Judge (J. D.) at Junnar.

Suit for redemption and partition.

One Rabha Dadaji Dhomse (the plaintiff) and his three brothers constituted a joint Hindu family of which the eldest brother Babu was the manager. Babu, in his capacity as the manager, conveyed the suit property by a conditional sale-deed in favour of the defendant on October 24, 1925. Thereafter there was a partition between the four brothers but one of the brothers viz. Ganga and the plaintiff, who was a minor then lived together. During the minority of the plaintiff, Ganga sold the suit property to the defendant in 1930. On November 20, 1943, more than seven years after attaining majority, the plaintiff filed the present suit for redemption of his ¼th share in the suit property on the allegation that the transaction dated October 24, 1925, was really in the nature of mortgage, that Ganga had no right to pass any sale-deed in respect of the plaintiff's share and that the plaintiff's right to claim redemption was in no way affected by reason of the sale-deed of 1930.

The defendant contended that when he purchased the suit property from Ganga in 1930, Ganga was the *de facto* and *de jure* guardian of the plaintiff, and that as the property was sold for family debts and for meeting the expenses of the plaintiff's marriage, the sale was binding upon the plaintiff. Another defence was that the suit not having been filed within three years on the plaintiff attaining majority or within 12 years from the sale-deed, it was barred by limitation.

The trial Court held that the sale of the suit property effected by Ganga in 1930 was binding on the plaintiff. The suit was therefore dismissed.

On appeal, the Extra Assistant Judge at Poona held that the sale of 1930 which was by a *de facto* guardian was not for legal necessity or for the benefit of the plaintiff who was then a minor and that it was not binding on the plaintiff. He therefore passed a decree for redemption of one-fourth share in favour of the plaintiff.

The defendant filed a second appeal in the High Court.

M. G. Chitale, for the appellant.

R. N. Bhalerao, for the respondent.

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RAJADHYAKSHA J. The plaintiff in the suit from which this second appeal arises was one Rabha Dadaji. Dadaji had four sons, Babu, Ganga, Taba and Radha. The four brothers formed a joint family of which the eldest brother Babu was the manager. As such manager, he conveyed the suit property by a conditional sale-deed in favour of the defendant on October 24, 1925. After the execution of this conditional sale-deed, there was, according to the finding of the lower Court, a partition between the four brothers. Although there was severance in interest between the four brothers, Babu and Taba's son (Taba was dead by that time) chose to live together and Ganga and Rabha who was then a minor lived together. During the minority of Rabha, Ganga sold the suit property to the defendant in the year 1930 for a sum of Rs. 1,000. More than seven years after attaining his majority, Rabha filed the present suit for recovery of possession of his ¼th share in the suit property on the allegation that the transaction dated October 24, 1925, was really in the nature of a mortgage. He alleged that Ganga had no right to pass any sale-deed in respect of his share and that the sale-deed so far as it relates to his share was not binding upon him. He contended that his right to claim redemption was in no way affected by reason of the sale-deed of the year 1930. He stated that as the defendant had purchased the share of Ganga in the mortgaged property, he was entitled to claim redemption of his own ¼th share in the mortgaged land.

The defendant resisted the suit on the ground that when he purchased the land from Ganga in the year 1930, Ganga was the *de facto* and the *de jure* guardian of Rabha, and as the property was sold for payment of the family debts and for meeting the expenses of Rabha's marriage, the sale was binding upon Rabha. Another defence to the suit was that as the suit was not filed within three years after Rabha attained majority or within 12 years from the sale-deed, it was barred by limitation.

The learned trial Judge held that Ganga was the *de facto* guardian of Rabha at the time of the sale. He found that the sale was for legal necessity and was therefore binding upon the plaintiff. He raised an issue as to whether the suit was tenable without the sale-deed being declared void, and although he came to the conclusion that the suit was tenable, there is no discussion of that issue in the judgment of the trial Court. In accordance with these findings the trial Judge dismissed the plaintiff's suit with costs. Against that decision an appeal was

preferred to the District Court of Poona and was heard by the learned Assistant Judge. He also found that Ganga was the *de facto* guardian of the plaintiff Rabha. But on the point of legal necessity for the sale-deed, he took a view different from that of the learned trial Judge. He was of opinion that the legal necessity for the sale-deed had not been proved and that therefore the sale-deed was not binding on Rabha. Relying upon the decisions of this Court in *Hanmantappa* v. *Dundappa*,[1] and *Malkarjun Annarao* v. *Sarubai Shivyogi*,[2] he held that as there was no legal necessity for the sale, it was void *ab initio* and that therefore it was not necessary for the plaintiff to file a suit for setting it aside before asking for redemption of the suit property. His conclusion is expressed in the following words:

"It follows from this ruling that a sale of minor's property by a *de facto* guardian would be void *ab initio* if it is not supported by legal necessity. It is for this reason that we have to consider whether there was legal necessity justifying the sale-deed that Ganga passed. If legal necessity is proved, then the sale would be binding on the minor's share or interest but if no legal necessity is proved the sale would be void and in that case art. 44 of the Indian Limitation Act would not apply."

As the learned Assistant Judge's finding was that there was no legal necessity for the alienation, he held that the plaintiff was entitled to sue for redemption and that art. 44 of the Limitation Act created no bar in his way. Accordingly, the learned Assistant Judge set aside the order of the trial court and decreed the plaintiff's suit for redemption of his ¼th share in the suit mortgage on payment of Rs. 150 which was the amount found due on the mortgage. Against that order the defendant has come in second appeal.

In appeal Mr. Chitale on behalf of the appellant first contended that in law the learned appellate Judge was wrong in holding that there was no necessity for the sale. The consideration for the sale deed has been shown to consist of Rs. 300 due on the mortgage of 1925, Rs. 236-4-0 due on some other mortgages and Rs. 463-12-0 on account of the marriage expenses of the plaintiff who was 12 years old in 1930. There is no dispute—and the plaintiff admits—that Rs. 300 were due on the mortgage of 1925. But there is no evidence about Rs. 236-4-0 being required for the satisfaction of other mortgages, and it is conceded before us that the necessity to the extent of Rs. 236-4-0 has not been established. The whole question therefore depended upon as to whether Rs. 463-12-0 for the marriage expenses of the plaintiff could be regarded as expenditure on account of necessity.

[1] (1933) 36 Bom. L. R. 474. [2] (1942) 45 Bom. L. R. 259.

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The learned Assistant Judge has held that this expenditure could not be regarded as necessary on account of the fact that at the time of the marriage, the plaintiff was only 12 years old. The Child Marriage Restraint Act of 1929 had come into force in October 1929 and had prohibited marriages of children of 12 years of age. It was held in *Ram Jash Agarwala* v. *Chand Mandal*,[1]

"There is no rule of Hindu law sanctioning early marriages of male children and there is no duty upon the parents or guardians to marry their sons or male wards before they attain majority. The practice of early marriages of Hindu minors may be sanctioned by usage; but it has been disapproved by the passing of the Child Marriage Restraint Act of 1929. There is no legal necessity justifying alienation of the minor's properties to meet the expenses of the minor's marriage."

The same view was taken in *Hansraj Bhuteria* v. *Askaran Bhuteria*,[2] and *Tikki Lal* v. *Komalchand*.[3] Therefore there was not only no legal necessity for celebrating the marriage of the plaintiff when he was only 12 years old, but there was a legal prohibition of such marriage taking place on account of the enactment of the Child Marriages Restraint Act of 1929. In our opinion therefore the learned Assistant Judge was right in holding that the marriage expenses of minor Rabha did not constitute legal necessity under the Hindu law, and that therefore no necessity was proved to the extent of Rs. 700 out of the consideration of Rs. 1,000 for the sale-deed of 1930. We, therefore agree with the view taken by the learned Assistant Judge that there was no justifying legal necessity for the sale-deed of 1930.

The question therefore arises whether the present suit was maintainable without the plaintiff having taken steps to set aside the sale-deed of 1930. It was held by the Privy Council in *Musammat Bachi* v. *Bikhchand*,[4]

"Special relief under the Dekkhan Agriculturists' Relief Act could not be granted in a suit, which was in form a suit for redemption but in reality was a suit to recover property of which the rightful owner had been deprived by fraud."

If therefore the sale-deed was binding on the Plaintiff until it was set aside within the period allowed under art. 44 of the Limitation Act, the plaintiff would not be entitled to ignore the sale and to file a suit for redemption as in the present case. See also *Malkarjun* v. *Narhari*,[5] and *Fakirappa Limanna Patil* v. *Lumanna bin Mahadu Dhamnekar*.[6] The question therefore

[1] (1937) 2 Cal. 764.
[2] [1941] A. I. R. Cal. 244.
[3] [1940] A. I. R. Nag. 327.
[4] (1911) 13 Bom. L. R. 56.
[5] (1900) 25 Bom. 337.
[6] (1919) 44 Bom. 742.

boils down to this: Is the sale-deed of 1930 executed by the *de facto* guardian of the plaintiff during his minority in favour of the defendant void as not being justified by legal necessity, so that the plaintiff could ignore the sale and file a suit for redemption?

There is a direct authority of our High Court in the decision of Mr. Justice Divatia in *Malkarjun Annarao* v. *Sarubai Shivyogi*.[1] The learned Judge's observations in that case are as follows (p. 265):—

> "In the case of a person who is not a manager but a *de facto* guardian it has been held by a full bench of our High Court in *Tulsidas v. Vaghela Raisingji*[2] that such guardian can validly sell the minor's property only for his benefit or legal necessity. It would therefore be void if no legal necessity was proved. It is thus quite clear that if such alienation is made either by a manager of a Hindu family or a *de facto* guardian of the minor's interest in the property, it is not voidable but is void in its inception. If the alienation is made by a natural guardian or a guardian appointed by the Court, then only it is required to be avoided within three years after attaining majority."

If this decision of Mr. Justice Divatia is good law, then it would completely cover the facts of this case, and it must be held that the alienation is void in its inception, and was not therefore binding upon the plaintiff and that he could proceed to ask for redemption without filing a suit to set aside that alienation. But it has been argued by Mr. Chitale for the appellant that this decision should be reconsidered and it should be held (*i*) that even in the absence of necessity an alienation by a *de facto* guardian of the minor's property is not a void transaction, but is only voidable, so that the plaintiff was bound to sue for setting aside that alienation before filing a suit for redemption and (*ii*) that as no suit had been filed for setting aside the sale-deed within the period prescribed under art. 44 of the Limitation Act, the plaintiff was not entitled to maintain the present suit for redemption.

So far as the Mohamedan law is concerned, there is no doubt that the alienation by a *de facto* guardian whether for necessity or otherwise is *ab initio* void. In *Mata Din* v. *Ahmed Ali*,[3] Lord Robson observed (p. 55):—

> "It is urged on behalf of the appellant that the elder brothers were *de facto* guardians of the respondent, and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore, necessary in his interest. It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as

[1] (1943) 45 Bom. L. R. 259. [2] (1932) 57 Bom. 40.
[3] (1911) L. R. 39 I. A. 49.

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a 'de *facto*' guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it."

In a later decision of the Privy Council in *Imambandi* v. *Mutsaddi*[1]. Their Lordships affirmed the same principle and, relying upon the observations of Lord Robson in *Mata Din* v. *Ahmed Ali*[2] stated as follows (pp. 92, 83):—

"For the foregoing considerations their Lordships are of opinion that under the Mahomedan law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a '*de facto* guardian', has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. It follows that, being himself without title, he cannot seek to recover property in the possession of another equally without title.....The term '*de facto* guardian' which has been applied to those persons is misleading. It connotes the idea that the people in charge of the child are, by virtue of the fact, invested with certain powers over the infant's property. This idea is quite erroneous."

Relying on these observations of the Privy Council, Mr. Bhalerao on behalf of the plaintiff has contended that the alienation of 1930 being that by a *de facto* guardian without any justifying legal necessity, is void *ab initio* and the plaintiff was not bound by such alienation. Mr. Chitale on behalf of the appellant-defendant has, however, argued that the position under the Hindu law is somewhat different. Mr. Chitale is undoubtedly correct when he said that the position under the Hindu law is different if the alienation is for necessity. In *Hunoomanprasaud Panday* v. *Mussumat Babooee Munraj Koonwaree.*[3] Their Lordships of the Privy Council stated (p. 412):

"It is to be observed that under the Hindu law, the right of a *bona fide* incumbrancer who has taken from a *de facto* Manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title".

Their Lordships further observed (p. 421):

"The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded."

[1] (1918) L. R. 45 I. A. 73. [2] (1911) L. R. 39 I. A. 49.

[3] (1856) 6 Moo. I. A. 393.

Following this decision of the Privy Council in *Hunoomanprasaud's* case, it was held by a Full Bench of this Court in *Tulsidas* v. *Vaghela Raisingji*[1].

"that under Hindu law, a *de facto* guardian of a minor can validly sell the property of the minor to a third person for legal necessity."

That was a decision of Patkar and Barlee JJ. who relied principally on *Hunoomanprasaud's* case, whereas Beaumont C. J., who took a different view, was inclined to follow the principles laid down by the Privy Council, so far as Mahomedan law was concerned. The earlier decision in *Limbaji Ravji* v. *Rahi*[2] in which it was held "that a sale made by a step-mother on behalf of her minor son was a sale by an unauthorised person and that it was not voidable, but void *ab initio* even though there was a justifying necessity for the sale; was not approved. This decision of the Full Bench in *Tulsidas* v. *Vaghela Raisingji*[1] was in conformity with the earlier decisions of this Court in *Bai Amrit* v. *Bai Manik*[3] and *Nathuram* v. *Shoma Chhagan.*[4] In the first case although the sale was by the natural guardian, it was treated on the footing as if it was a sale by a *de facto* manager. In the second case, the loan in question was taken by a *de facto* guardian of a minor. In both the cases the alienations were for legal necessity, and the alienations were held to be valid. In *Adhar Chandra Dutta* v. *Kirtibash Bairagee*[5] it was conceded by Dr. Rash Behary Ghose that the powers of a *de facto* guardian are the same as those of a legal guardian. But the concession was made by the learned Doctor when it was found as a fact that there was necessity for the repairs for the benefit of the estate and that the income of the property was not sufficient to provide the requisite funds and that consequently it was necessary to sell what was old. In *Arunachela Reddi* v. *Chidambara Reddi*[6] it was observed (p. 224):

"It is well-settled that an alienation may be validly made by a *de facto* guardian, assuming of course a necessity."

The case of *Mohanund Mondul* v. *Nafur Mondul*[7] also supports the same proposition. It must therefore be held as well settled that an alienation by a *de facto* guardian, if effected for necessity and for the benefit of the estate of the minor, will be upheld by Courts.

(1) (1932) 57 Bom. 40.
(2) (1925) 49 Bom. 576.
(3) (1875) 12 Bom. H. C. R. 79.
(4) (1890) 14 Bom. 562.
(5) (1910) 12 Cal. L. J. 586.
(6) (1903) 13 Mad. L. J. 223.
(7) (1899) 26 Cal. 820.

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But these decisions do not lay down as to what the powers of a *de facto* guardian are. If a *de facto* guardian alienates the property of a minor for necessity, such a transaction would be upheld by the Courts. But does it follow therefrom that a *de facto* guardian has any power to deal with the minor's property? It has been urged by Mr. Bhalerao for the plaintiff-respondent that the *de facto* guardian under Hindu law has no power to mortgage or sell the property of the minor, that his position is no better than that of an executor *de son tort,* and that although he would be subject to all the disabilities of a guardian, he could not clothe himself with the rights so as to give a valid title to a purchaser or to effect a valid mortgage of the property. Mr. Chitale, on the other hand, contends that a *de facto* guadian is, under Hindu law, in the same position as a *de jure* guardian, and that although his alienations may be challenged by the minor on his attaining majority and are therefore voidable, they are not void *ab initio* so that the minor can ignore them.

In *Balappa* v. *Chanbasappa*[1] it was held by Scott C. J. and Shah J. "that art. 44 of the Second Schedule to the Indian Limitation Act has no application to the case of a *de facto* guardian wholly unauthorised to effect a transfer." That was a case of an alienation of the minor's property by the step-mother of the plaintiff. It was held (p. 1136):

> "The step-mother cannot be in a better position than any other manager to deal with immoveable property which is not her own. A mother or a step-mother, whether a Hindu or otherwise, purporting to act on behalf of a minor son is, to use the words of s. 38 of the Transfer of Property Act, a person authorised only under circumstances in their nature variable to dispose of immoveable property and the onus of proving authority arising from necessity or apparent authority arising from that cause justified by reasonable inquiry, is upon the person who tries to assert the transfer against a minor."

The alienation could not be binding upon the minor unless it was supported by necessity and therefore an issue was sent down to the trial Court to find out whether the sale by the step-mother to the defendant was for necessity, and whether it was binding upon the plaintiff. This decision is said to have been overruled by a Full Bench decision in *Fakirappa Limanna* v. *Lumanna Bin Mahadu*[2] to which case also Shah J. was a party. In that case, however, the plaintiff's mother, acting as the natural guardian of her son, sold the equity of redemption in a certain property to the defendant.

[1] (1915) 17 Bom. L. R. 1134. [2] (1919) 44 Bom. 742.

The minor son Omanna attained majority and subsequently died. The plaintiff who was the next reversioner, sued to recover possession of the suit property from the defendant or in the alternative to redeem the mortgage. It was held that the suit was governed by atr. 44 of the Limitation Act. because Omanna ought to have sued to set aside the alienation within three years of his attaining majority. It would be noticed that this case *Fakirappa Limanna* v. *Lumanna Bin Mahadu*[1] was the case of an alienation by the natural guardian of a minor, whereas the earlier case of *Balappa* v. *Chanbasappa*[2] was a case of a *de facto* guardian, and it was precisely on this footing that Mr. A. G. Desai who appeared for the defendant sought to distinguish this case. His arguments as reproduced at page 750 of the Report are these:

"The alienation in each of these cases was by a *de facto* guardian and not by a guardian *de jure* and could thus very rightly be ignored. In the case under consideration however the alienation is by the mother who is recognised under Hindu law as the natural and the lawful guardian of the minor. In such a case the alienation being good on the face of it cannot be ignored, but must be set aside within three years as laid down in art. 44."

It would appear from the judgment of the learned Chief Justice and particularly from the judgment of Mr. Justice Shah, that Their Lordships recognised this distinction, for, at page 764 Shah J. states as follows:—

"I am satisfied that the reasoning in *Balappa* v. *Chanbasappa*[2] can not be properly applied to the case of a sale by the natural guardian of a Hindu minor, who has power to sell the property of the minor under certain circumstances."

Therefore although the head-note to the Report says that *Balappa* v. *Chanbasappa*[2] and *Anandappa* v. *Totappa*[3] had been overruled, it will be noticed that the Full Bench case of *Fakirappa Limanna* v. *Lumanna Bin Mahadu*[1] dealt with the case of an alienation by the natural guardian of a minor while the earlier case of *Balappa* v. *Chanbasappa*[2] dealt with the case of an alienation by a *de facto* guardian. The real ratio of the decisions as stated by Shah J. at page 766 is as follows:—

"On a further consideration I am satisfied that the necessity for suing to set aside a sale does not depend so much upon the question whether the onus lies upon the plaintiff or the defendant in the first instance, but upon the question whether the sale is by a person wholly unauthorised or by a person who is authorised only under certain

[1] (1919) 44 Bom. 742. [2] (1915) 17 Bom. L. R. 1134.
[3] (1915) 17 Bom. L. R. 1137.

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circumstances to alienate the property or in other words whether the sale is null and void or only voidable if the person interested seeks to avoid it."

The alienation by a natural guardian can be said to have some basis in legal authority and therefore the alienation may be binding upon the minor, if it is for necessity, or voidable at the option of the minor if it is not for necessity. The same cannot be said of an alienation by a *de facto* guardian who is nothing more than an intermeddler and cannot derive any kind of authority for alienation of the property by reason of his merely being a *de facto* guardian without being placed in the position of authority either by relationship with the minor or by the appointment as such by Court.

It is true that there have been observations in some cases that the powers of a *de facto* guardian are the same as those of a natural guardian. But wherever those observations have been made, as for instance, in *Mohanund Mondul* v. *Nafur Mondul*[1] or in *Adhar Chandra Dutta* v. *Kirtibash Bairagee*,[2] they have been made in order to uphold an alienation made by a *de facto* guardian for necessity. We have not been referred to a single case where a *de facto* guardian had alienated property of the minor without a justifying necessity, and the transaction was held not void, but only voidable at the option of the minor, except perhaps the observations in one Madras case to which I shall presently refer.

Apart from authorities, it seems to us that an alienation by a *de facto* guardian of the minor's property without justifying necessity must be held to be void *ab initio*, as has been held by Mr. Justice Divatia in *Malkarjun Annarao* v. *Sarubai Shivyogi*.[3] As stated by Their Lordships of the Privy Council in the decision under Mahomedan law the *de facto* guardian is nothing more than an intermeddler not deriving any authority for the alienation either by natural relationship with the minor or legal authority from appointment by a Court. There seems no reason why in such a case a minor should be held bound by the transaction which is not for his benefit and has been entered into by a person who has no semblance of authority to deal with the minor's property.

The one Madras decision where observations in support of Mr. Chitale's contentions have been made is *Seetharamanna* v. *Appiah*.[4] In that case the learned Judges have taken the same

(1) (1899) 26 Cal. 826.
(2) (1910) 12 Cal. L. J. 586.
(3) (1942) 45 Bom. L. R. 259.
(4) (1925) 49 Mad. 768.

view as all the other High Courts so far as the alienation by a *de facto* guardian of a Hindu minor for the necessity of the minor is concerned. They have held that such alienation is valid under the Hindu law. But they have gone on to observe that "an alienation by a *de facto* guardian, not for a necessity of the minor, is only voidable and therefore can be ratified by the minor on attaining his age of majority." It would be noticed that even in this case the learned Judges have used the word "voidable" in the sense that it is open to the minor to ratify the alienation on attaining majority. They have not said that it confers a good title on the alienee until it is set aside by the minor. The very observations of the learned Judges that the alienation can be ratified by the minor on attaining majority suggests that until it is so ratified, it is open to the minor to ignore such alienation. The other decisions of the Madras High Court, however, have expressed a contrary view. In *Thayammal* v. *Kuppanna Koundan*[1] the head-note to the Report is as follows:—

"Under the Hindu law, nobody else than the father and the mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors) is entitled as a matter of natural right to be and to act as a guardian of a minor's person and property; consequently a paternal aunt is not a natural guardian of a minor.

Where there is no natural guardian alive, recourse must be had to the Court, as representing the rights of the King which are paramount to even the rights of the parents, for the appointment of a guardian.

Alienations without necessity, made by a *de facto* guardian, need not be set aside.

Article 44 of the Limitation Act (IX of 1908) does not apply to alienations by unauthorised guardians."

In *Ramaswami Pillai* v. *Kashinatha Iyer*,[2] it was held:

"a *de facto* guardian is under the Hindu law in the same position as the *de jure* guardian, so far as at least the acts done by him for the benefit of the minor are concerned, and as regards such acts the same test is to be applied as would be applied in the case of an alienation by a legal guardian."

In that case one of the transactions evidenced by Exhibit 1 was not held to be justified by legal necessity and at page 232 of Report Kumaraswami Sastri J. stated

"that Article 44 of Schedule 1 to the Limitation Act does not apply to cases of alienations by *de facto* guardians."

[1] (1914) 38 Mad. 1125. [2] [1928] A. I. R. Mad. 226.

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In *Chinna Alagumperumal Karayalar* v. *Vinayagathammal*,[1] the property was alienated by a *de facto* guardian without legal necessity. The learned Judges held that the sale was void and not binding upon the minor. It has been observed as follows at page 114 of the Report:—

"Moreover, it has been held in several cases that the unauthorised or improper alienation of a minor's property by a *de facto* guardian need not be set aside. As we have held that the sale is absolutely void, defendant No. 1 is not entitled to be paid the amount that he spent to relieve the burden on the estate, as he was only a volunteer inasmuch as he had no title to the property."

In *Bapayya* v. *Pundarikakshayya*[2] Wadsworth C. J. and Patanjali Sastri J. held as follows:—

"The test of a transfer being void or voidable is not always decisive on the question of the liability of the transferee for mesne profits on the transfer being set aside. While an alienation by a *de facto* guardian for necessity is binding on the minor, the minor need not sue to set aside an alienation without necessity by such a person, within three years of attaining majority, but can sue for possession treating it as a nullity just like a reversioner. That is to say, no improper alienation by a *de facto* guardian is binding on the minor until it is set aside, although it may be voidable in the sense that he may elect either to ratify it or avoid it by treating it as a nullity."

The trend of the decisions of the Madras High Court therefore is that an alienation by a *de facto* guardian of the minor's property is void in the sense that it confers no title upon the alienee, and that it is open to the minor, on attaining majority either to ratify it or to ignore the transaction altogether.

Mr. Chitale for the appellant invited our attention to a decision of a single Judge of the Lahore High Court in *Tapassi Ram* v. *Raja Ram*.[3] Bhide J. in that case expressed the opinion "that under Hindu law, a mortgage effected even by a *de facto* guardian is not a void but only a voidable transaction." It appears, however, that the attention of the learned Judge was not invited to an earlier Division Bench decision of the same Court in *Labha Mal* v. *Malak Ram*[4] where a different view has been expressed. In the course of his judgment, Shadi Lal C. J. made the following observations (p. 620):—

"It is true that the Courts below have held that the sale was not for necessity, but that finding does not affect the nature of the transaction, which should be treated as an unauthorised transfer by an authorized guardian. (That was a sale by the natural guardian of the minor). If a sale is effected by a person who is not the minor's guardian either

(1) [1929] A. I. R. Mad. 110.
(2) [1946] A. I. R. Mad. 198.
(3) [1930] A. I. R. Lah. 136.
(4) [1925] A. I. R. Lah. 619.

according to his personal law or by appointment by the Court, such a sale is a nullity and does not affect the minor's property. If, on the other hand, the sale is made by a natural guardian, who goes beyond the scope of his authority, the transaction cannot be regarded as a nullity and will bind the minor unless he succeeds in impeaching it within the period prescribed by law."

This decision of the Lahore High Court supports the view which we are taking.

A case precisely in point was decided by the Patna High Court in *Kailash Chandra* v. *Rajani Kant.*[1] Chhatterji J. made the following observations in the course of his judgment (p. 300):—

"It is obvious that this article (Article 44 of the Limitation Act) can have no application unless the transfer sought to be set aside is voidable in the sense that it is binding on the minor until it is set aside. It may be assumed for the present purpose that under the Hindu law an alienation by a natural guardian, not for necessity, is voidable in this sense, so that a suit to set aside such alienation will be governed by Art. 44. It may also be regarded as well settled by judicial decisions that under the Hindu law an alienation by a *de facto* guardian, if for necessity, is binding on the minor. But it does not follow that an alienation by a *de facto* guardian, not supported by necessity, is voidable in the sense that it is binding on the minor until it is set aside. Mr. B. Mahapatra on behalf of the appellant laid great stress on the observation in some of the decided cases that the powers of a *de facto* guardian are the same as those of a legal guardian: see *Seetharamanna* v. *Appiah*,[2] *Ramaswami Pillai* v. *Kasinatha Iyer*,[3] and *Bangarammal* v. *Lydia Kent.*[4] But if these decisions are closely examined, it will appear that this observation has reference to cases where the alienation is for necessity, whether made by the legal guardian or by *de facto* guardian. In the last mentioned case Curgenven J. clearly stated that a *de facto* guardian under the Hindu law ' is in the same position as a *de jure* guardian so far as acts done for the minor's benefit are concerned.' "

To extend this analogy to cases where the alienation by a *de facto* guardian is not for the benefit of the minor would be to assign to the *de facto* guardian the same position as that of a legal guardian under the Hindu law, a position for which I find no jurisdiction. In *Adeyya* v. *Govindu*,[5] however, Curgenven J., sitting alone, observed:—

'If a *de facto* guardian, equally with a *de jure* guardian, can alienate for necessity, it is not very easy to perceive why, if not so supported, the one should be only voidable and the other void. Even to alienate for necessity connotes some power to deal with the property and indeed not only is such a power recognised in *de facto* guardian but the view seems to be that in all such dealings no distinction can be drawn between the powers of the two classes of guardians.'

(1) [1945] A. I. R. Pat. 298.
(2) [1926] A. I. R. Mad. 457.
(3) [1928] A. I. R. Mad. 226.
(4) [1934] A. I. R. Mad. 605.
(5) [1931] A. I. R. Mad. 274.

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But with all respect, the distinction between the powers of the two classes of guardian lies in the fact that while the *de jure* guardian is under the law clothed with authority to deal with the minor's property, the *de facto* guardian is not clothed with similar authority, though if the latter alienates the minor's property for his benefit, the court will uphold "the transaction. In the case of an alienation by a *de jure* guardian, not for the benefit of the minor, the guardian acts in excess of his authority derived under the law, whereas in the case of a similar alienation by a *de facto* guardian, his act is wholly unauthorised. In the latter case, however, the minor may choose to ratify the transaction, though it is not binding on him. To that extent the alienation is voidable. The position is the same as in the case of an alienation by a Hindu widow, unsupported by legal necessity, which, as pointed out by the Privy Council in *Bijoy Gopal* v. *Krishna Mahishi Devi*,[1] may be affirmed by the reversioner, though it is not binding on him, and is in that sense voidable." With respect we are in agreement with the view expressed by the Patna High Court.

The learned Appellate Judge in the Court below has also relied on the case of *Hanmantappa* v. *Dundappa*.[2] That was a case of an alienation by a manager of a joint Hindu family, consisting of himself and his minor brother, of two fields belonging to the joint family property to defendant No. 1 who was a member of another joint Hindu family. The sale was effected on June 24, 1913. The minor brother Ramaswami, on attaining majority, sold his undivided half share in the two fields to the plaintiff on November 13, 1922. On June 9, 1925, the plaintiff sued to recover his half share in the two fields by partition. This Court (Broomfield and Wadia JJ.) held that the suit was not barred by limitation as it was not necessary for the minor to set aside the alienation, but all that he had to do was to bring a suit to recover his share which, if legal necessity had not been proved would have been unaffected by the sale. It would appear that even a manager of a joint Hindu family cannot bind a minor by an alienation which is not for legal necessity, and that in such a case it is not necessary for a minor to set aside the sale under art. 44 of the Limitation Act within the period prescribed therein and that it is open to him to ignore the sale and to sue for possession. The powers of a *de facto* guardian cannot be placed on a higher footing than those of a manager of a joint Hindu family. The manager has some legal basis for the exercise of

[1] (1907) 5 Cal. L. J. 334. S. C. L. R. 34 I. A. 87.

[2] (1933) 36 Bom. L. R. 474.

the power of alienating joint family property. In some cases the alienation may be good as being justified by legal necessity; but if it is not for legal necessity, it is open to the minor to ignore the alienation and it is not necessary for him to have the sale set aside before suing to recover his share in the joint family property. A *de facto* guardian is an intermeddler and does not derive authority to deal with the property either from natural relationship with the minor or from legal authority conferred upon him by a Court. The case of an alienation by a *de facto* guardian, which is not justified by legal necessity, is far weaker than that of an alienation by a manager of a joint Hindu family.

In our opinion therefore an alienation by a *de facto* guardian which is not justified by legal necessity is void in the sense that it confers no title upon the alienee. It is open to the minor on attaining majority to ignore such an alienation and to proceed to file a suit for the recovery of the property without, in the first instance, filing a suit for setting aside the alienation within the period prescribed under Article 44 of the Limitation Act. We think that the view taken by Divatia J. in *Malkarjun Annarao* v. *Sarubai Shivyogi*[1] is correct and does not call for reconsideration.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

K. B. S.

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[1] (1942) 45 Bom. L. R. 259.